



THE AMERICAN LAW INSTITUTE

Restatement of the Law Third, Consumer Contracts

First Advisers' Meeting

Friday, November 30, 2012

New York University School of Law

Agenda

- 9:00 - 9:15: Opening Remarks by Lance Liebman, Omri Ben-Shahar, and Oren Bar-Gill
9:15 - 10:45: Panel 1: Scope and Organization
10:45 - 11:00: Break
11:00 - 12:30: Panel 2: Relation to Statutory Law
12:30 - 1:45: Lunch break
1:45 - 3:15: Panel 3: Regulation of Information Prior to Contract
3:15 - 3:30: Break
3:30 - 5:00: Panel 4: Assent – Preliminary Exploration

Panel 1: Scope and Organization

The enclosed draft Outline presents the proposed scope and organization of the Restatement Project. The first panel will discuss the choice of issues, whether some should be added or removed, and their proper organization.

Panel 2: Relation to Statutory Law

The Restatement Project will focus on the common law of contracts and on general sales law (embodied in the Uniform Commercial Code). There is, however, a large body of statutory and regulatory law that affects consumer transactions. How should the Restatement Project treat this body of law?

It is not the aim of the Restatement project to summarize in a comprehensive manner the statutory protections. The preferred approach, to be discussed in the panel, is to distill from the statutory law, or from the case law that developed around it, principles that can inform contract law doctrines. (E.g., FTC Act, Sec. 5 jurisprudence can inform the application of unconscionability doctrine, the fraud/misrepresentation doctrines, and the reasonable expectations doctrine.)

Panel 3: Regulation of Information Prior to Contract

Some of the most active areas of consumer contract law relate to the information consumers receive prior to a contract. In general, two regulatory techniques are applied:

- (i) Anti-fraud rules that govern voluntary statements and disclosures made to consumers, and
- (ii) Mandated disclosure.

In the first part of the panel's discussion, Professor Steven Burton will present a survey of the approaches taken by courts to address one of the issues in category (i): The systematic divergence between sellers' precontractual representations and the terms of the fine print.

In the second part of the panel's discussion, Professor Michael Greenfield will present a survey of issues relating to mandated disclosure. While mandated disclosure is a technique used often in numerous areas of consumer protection law, there are several issues that pose systematic challenges to contract law doctrine. Does compliance with disclosure mandates provide a safe harbor for the discloser against claims of fraud, misrepresentation, and unconscionability? How can the law resolve problems of over-disclosure? Or of perfunctory disclosure coupled with additional, conflicting, promotional statements?

Panel 4: Assent – Preliminary Exploration

Much effort in the area of consumer contract law is aimed at assuring "meaningful" assent to the contractual terms. Indeed, one of the more controversial issues in recent years has been the legal consequence of various passive modes of contracting, especially in digital settings. The ALI's Principles of the Law of Software Contracts, as well as the proposed Amendments to Article 2 of the Uniform Commercial Code, addressed these issues.

The panel's discussion will explore the position that the Restatement Project ought to take on these issues. The Reporters will present trends in case law and the position adopted by the ALI's Principles of the Law of Software Contracts. Professor Florencia Marotta-Wurgler will present some of her empirical findings on the reality of assent in consumer contracts.

In addition, the panel will examine another set of problems related to meaningful assent—silent modification of contracts. Many consumer contracts permit the business to change the terms of the contract unilaterally with little more than a notification (and sometimes not even that), and businesses take frequent advantage of this option. This practice poses additional pragmatic and conceptual challenges for the objective of meaningful informed assent.